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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1519

PERRY LEVEY and MYRON LEVEY,

Petitioners,

vs.

UNITED STATES OF AMERICA and JOHN R. CASSIE, JR., Special Agent, Internal Revenue Service, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PERRY LEVEY and MYRON LEVEY,

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UNITED STATES OF AMERICA and JOHN R. CASSIE, JR., Special Agent, Internal Revenue Service, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners Perry Levey and Myron Levey (hereinafter "taxpayers") respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on February 13, 1980.

Opinions Below

The opinion of the Court of Appeals, which is not yet officially reported, is reprinted as Appendix A annexed hereto. A copy of the Judgment of the Court of Appeals is annexed hereto as Appendix B. The opinion and order issued by the United States District Court for the District of New Jersey annexed hereto as Appendix C is reported at 469 F.Supp. 612.

Jurisdiction

The judgment of the Court of Appeals (Appendix B) was entered on February 13, 1980. On March 6, 1980 an order was entered by the Court of Appeals staying issuance of the mandate until April 4, 1980 with the proviso that if the Court of Appeals receives notification from the Clerk of the Supreme Court prior to April 4, 1980 that a petition for a writ of certiorari has been filed, the stay shall continue until final disposition by the Supreme Court. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Question Presented

Whether the Court of Appeals erroneously modified the "possession" requirement set forth in *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964) when it ordered enforcement of an administrative summons served on a third-party recordkeeper for Forms 1099 and 1087 which forms had been already filed with and were possessed by the Government?

Statutes Involved

The pertinent provisions of Section 7602, 7604 and 7609 of the Internal Revenue Code of 1954 (26, U.S.C.) are set forth in Appendix D.

Statement

John R. Cassie, Jr., a special agent of the Internal Revenue Service (IRS), commencing in July 1978, served administrative summonses upon third-party recordkeepers "in the matter of the tax liabilities of Perry and Vicki Levey and Myron and Heidi Levey", demanding, *inter alia*, production by the third-party recordkeepers of retained copies of Forms 1099 and 1087 relating to taxpayers-petitioners Perry Levey and Myron Levey. Pursuant to 26 U.S.C. §7609 (b)(2), compliance with the summonses was stayed by timely written notice on behalf of the taxpayers to third-party recordkeepers, with a copy of said notice to the special agent who issued the summonses.

By orders to show cause the Government petitioned the United States District Court for the District of New Jersey pursuant to 26 U.S.C. §7604 for orders directing the third-party recordkeepers to produce the records sought. The third-party recordkeepers took no position on the petitions, and the petitions and summonses were consolidated. The taxpayers-petitioners intervened pursuant to 26 U.S.C. §7609 (b)(1) and opposed enforcement of the summonses.

The District Court granted the Government's petitions except insofar as the petitions sought production of Forms 1099 and 1087 because it held that the forms were already in the Goverment's possession and therefore could not be obtained by summons under *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964).

The Court of Appeals (Appendix A annexed hereto) affirmed the District Court's order enforcing the summonses except insofar as it exempted from production the retained copies of Forms 1099 and 1087. This petition is concerned solely with the Forms 1099 and 1087 issue. The Court of Appeals granted a stay of its order pending the filing of a petition for certiorari by April 4, 1980.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals for the Third Circuit erroneously modified the clear and unambiguous "possession" requirement of *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964).

The District Court found that the IRS had the Form 1099 information which it sought to obtain by summons and thus exempted the Forms 1099 and 1087 material from enforcement.

The Court of Appeals, while not disturbing that finding of the District Court, held that the information sought in those forms was neither accessible nor available to the IRS. By so doing, the Court of Appeals erroneously modified the lack of possession requirement notwithstanding the fact that the Commissioner had dominion and control over the forms.

In *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964), the Supreme Court announced several elements of good faith which the Internal Revenue Service must exhibit in order to be successful in a summons enforcement action:

> "[The Commissioner] must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, *that the information sought is not already within the Commissioner's posession*, and that the administrative steps required by the Code have been followed . . . [A] court may not permit its process to be abused." (emphasis added)

The requirement that the information sought not already be within the Commissioner's possession has never been modified. This Court should correct an erroneous interpretation of an important and often cited case relating to the conduct of federal tax investigations.

2. The decision of the Court of Appeals appears to conflict with a decision of the Court of Appeals for the Fourth Circuit on the issue of whether enforcement of an Internal Revenue Service summons is proper where the Commissioner has possession of the documents he seeks to obtain by summons.

The Court of Appeals for the Third Circuit assumed, without proof by testimony or affidavit, that, while the Forms 1099 and 1087 "may technically be deemed within the physical proprietary control of the Government, it is clear that the 'information sought', *Powell*, 379 U.S. at 58, is, as a practical matter, neither accessible to nor available to I.R.S." (App. A, *infra*, p. 12a). Said holding is in clear conflict with *United States* v. *Theodore*, 479 F.2d. 749 (4th Cir. 1973).

In *Theodore* the Fourth Circuit refused to enforce a summons insofar as it demanded documents (Federal income tax returns) which were already in the possession of the Commissioner.

The District Court in *Theodore* adopted a very narrow definition of possession. While finding that the returns

sought were on file in the service center, it reasoned that it would be too expensive for the Commissioner to find the returns which were the subject matter of the summons. The Court of Appeals for the Fourth Circuit reversed and stated;

> "There is nothing in the record to support the conclusion that when IRS knows the name and social security number of a taxpayer, the Service cannot readily obtain his return. The obligation is upon the Commissioner to demonstrate that the material requested is not within his possession or, that if it is technically within his possession, he has no practical way of obtaining the desired item." *Id.* at 755.

The Fourth Circuit in its dictum does also suggest that inaccessibility is a gloss to be put on the word "possession". To this extent it reasons (we believe erroneously) with the Third Circuit. Its holding, however, conflicts with the Third Circuit and offers a confusing precedent for other circuits to follow.

If the Court grants the petition for a writ of certiorari in this case it would cure an erroneous interpretation of an important case affecting the conduct of federal tax investigations and would resolve a conflict between the Courts of Appeals.

CONCLUSION

For the above reasons it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

HERBERT L. ZUCKERMAN
Counsel for Petitioners

ZUCKERMAN, ARONSON & HORN
Attorneys for Petitioners

APPENDIX A

Opinion of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 79-1707 and 79-1708

UNITED STATES OF AMERICA AND
JOHN R. CASSIE, JR.,
Special Agent, Internal Revenue Service,
Petitioner

v.

FIRST NATIONAL STATE BANK OF NEW JERSEY,
Respondent

PERRY LEVEY, *Intervenor*

(D.C. Civil No. 78-3054)

UNITED STATES OF AMERICA AND
JOHN R. CASSIE, JR.,
Special Agent, Internal Revenue Service,
Petitioner

v.

BERKELEY FEDERAL SAVINGS AND
LOAN ASSOCIATION,
Respondent

PERRY LEVEY, *Intervenor*

(D.C. Civil No. 78-3055)

Appendix A

UNITED STATES OF AMERICA AND
JOHN R. CASSIE, JR.,
Special Agent, Internal Revenue Service,
Petitioner

v.

HUDSON CITY SAVINGS BANK,
Respondent

PERRY LEVEY, *Intervenor*

(D.C. Civil No. 79-0282)

UNITED STATES OF AMERICA AND
JOHN R. CASSIE, JR.,
Special Agent, Internal Revenue Service,
Petitioner

v.

LIVINGSTON NATIONAL BANK,
Respondent

PERRY LEVEY, *Intervenor*

(D.C. Civil No. 79-0283)

United States of America and John Cassie,
Petitioners in D.C. Civil No. 78-3054,
Appellants, No. 79-1707

Perry Levey, Intervenor in D.C. Civil No. 78-3054
and Myron Levey,
Appellants, No. 79-1708

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Appendix A

Argued January 9, 1980

Before: GIBBONS, ROSENN and GARTH,
Circuit Judges

(Filed February 13, 1980)

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OPINION OF THE COURT

GARTH, *Circuit Judge.*

In these cross-appeals, we are again presented with a challenge to the enforcement of Internal Revenue Service (I.R.S.) summonses directed to third-party recordkeepers. The taxpayer-intervenor (Levey) appeals at No. 79-1708 from the district court's order which granted enforcement with respect to most of the docu-

ments requested. The Government appeals at No. 79-1707 from the district court's refusal to order production of retained copies of forms 1099 and 1087. In light of our recent opinion in *United States v. Garden State National Bank*, 607 F.2d 61 (1979), we hold that Levey's challenge to enforcement must fail and we therefore affirm enforcement in No. 79-1708. In the Government's appeal at No. 79-1707, however, we hold that the district court erred in exempting the subpoenas for forms 1099 and 1087 from enforcement, and accordingly reverse that portion of the district court's order.

I.

The salient facts of this case are simple and follow the familiar *Garden State* pattern. I.R.S. Special Agent John Cassie was investigating the tax liabilities of Perry, Vikki, Myron, and Heidi Levey, jointly referred to as "Levey." In aid of his investigation, he issued several summonses to banks,[1] under the authority of I.R.C. §§7602, 7604 for the production of records relevant to the years 1973 through 1976. Levey caused the summonses to be stayed under I.R.C. §7609(b)(2), and the Government and Cassie instituted enforcement proceedings against the banks, who took no position on supporting or opposing enforcement. Levey intervened under I.R.C. §7609(b)(1), opposing enforcement. The petitions for enforcement of all of the summonses were consolidated in the district court.

1. The summoned parties were First National State Bank of New Jersey, Berkeley Federal Savings and Loan Association, Hudson City Savings Bank, Livingston National Bank, Glen Ridge Savings and Loan Association, Mayflower Savings and Loan Association, United States Savings Bank, West Essex Savings and Loan, Llewellyn-Edison Savings and Loan Association, Howard Savings Bank, Orange Savings Bank, and Walter Kidde & Co., Inc. While Walter Kidde & Co., Inc. is not a bank but rather an industrial corporation, all these third-party recordkeepers will be referred to collectively as "the banks."

Levey answered the enforcement petition by asserting that the summonses had been issued in bad faith. The district court heard oral argument, inspected Special Agent Cassie's files *in camera*, and enforced the summonses, except as to the banks' retained copies of forms 1099 and 1087.[2] *United States v. First National State Bank*, 469 F. Supp. 612 (D.N.J. 1979). The district court refused to deny enforcement generally. Essentially it held, as it did in the Keech appeal in *Garden State*, *see* 607 F.2d at 66, that as it understood *United States v. LaSalle National Bank*, 437 U.S. 298 (1978), no taxpayer could ever prove "institutional bad faith" as required by *LaSalle*. 469 F. Supp. at 616-19.[3] But the district court held that forms 1099 and 1087 were already in I.R.S.' possession and therefore could not be obtained by summons under *United States v. Powell*, 379 U.S. 48, 57-58 (1964). While acknowledging that it might be difficult for I.R.S. to retrieve these forms from its files, it held that this burden could not, and should not, be shifted to the banks. 469 F. Supp. at 615-16.

The district court determined that Levey could not appeal effectively without access to the sealed materials examined *in camera*, and so ordered their release to counsel on the condition that counsel not disclose them to Levey. But the district court stayed that order pending action thereon by this court, and on June 19, 1979 we refused to grant counsel access to the sealed materials.

2. These forms, one copy of which is retained by the preparer, reflect various types of nonwage income paid to taxpayers, such as payments of interest, investment dividends, liquidation distributions, and royalties. Form 1099 is filed by the individual or institution which is the source of the payments. Form 1087 is filed by any merely nominal or record recipient of such income and records distributions from the nominee to the actual recipients of the payments.

3. In *Garden State*, we rejected the interpretation of *LaSalle* on which the district court relied.

II.

A.

Levey argues that the district court's conclusion that I.R.S. was not guilty of "institutional bad faith" was clearly erroneous. Levey points to three items which he claims to be indicative of "institutional bad faith" or of abandonment of a civil tax-collection purpose:

> (1) the fact that the I.R.S. Deputy Commissioner wrote two letters denying a request under the Freedom of Information Act for reopening memoranda and continuation sheets on the ground that disclosure would disturb an ongoing criminal investigation;
>
> (2) a personal attitude of one I.R.S. official that he desired that the case be referred to the Justice Department for criminal prosecution; and
>
> (3) a refusal by I.R.S. to negotiate a compromise of the civil aspects of the case.

These items cannot — either individually or collectively — justify a denial of summons enforcement.

The parties stipulated that the Service has not referred this case to the Justice Department for criminal prosecution. 469 F. Supp. at 614. Levey has not challenged — and our examination of the record, including the sealed transcript, does not contradict — the Government's representation that the investigating agent has not yet recommended prosecution to his superiors within I.R.S. The taxpayer's burden of proof in challenging enforcement is therefore virtually insurmountable under *Garden State*, 607 F.2d at 70. We have concluded that the evidence in this case does not satisfy this burden of proof. Nor does it indicate that the investigating agent was acting as a conduit for the United States Attorney or that a recommendation for prosecution was being withheld to facilitate a criminal investigation, two situations

cited in *Garden State* as circumstances where if proved, a taxpayer would succeed in a challenge to enforcement.

The Deputy Commissioner's letters are Levey's strongest evidence,[4] and they fall short of the mark. One letter reads in full as follows:

> This is in response to your letter on behalf of Perry and Vicki Levey, dated April 5, 1979, in which you appealed the decision of the Newark District Director to deny access to certain documents you requested pursuant to the Freedom of Information Act (hereinafter cited as FOIA), 5 U.S.C. §552.
>
> We are affirming in part and reversing in part the determination of the District Director. We are enclosing a copy of a portion of the Reopening Memorandum, however the remainder is exempt from disclosure pursuant to subsections (b)(3) and (b)(7)(A) of the FOIA.

---

4. These letters were dated June 27, 1979, and were not introduced in evidence at the trial, which ended on April 27, 1979. For reasons we have been unable to ascertain, Levey moved in the district court that the letters be certified as a supplemental record, under Fed. R. App. P. 10(e), rather than moving for relief from judgment based on newly discovered evidence, under Fed. R. Civ. P. 60(b)(2). However, as Judge Biggs, writing for this court in United States *ex rel.* Mulvaney v. Rush, 487 F.2d 684 (3d Cir. 1973), stated in an almost identical context:

> Rule 10(e) is apparently intended to "supplement" a record, not to supply in substance a large new record never before the District Court and never considered by it.[5] We are not a fact-finding body. We are entitled to have the judgment of the district court both as to findings of fact and conclusions of law in a case such as that at bar.
>
> 5. The purpose of the rule is to permit correction or modification of the record transmitted to the Court of Appeals so that it adequately reflects what happened in the District Court.

Id. at 687 (citations omitted from footnote). Our conclusion that the letters do not support Levey's case makes further comment on the procedural point unnecessary.

Appendix A

Subsection (b)(3) protects information which is:

> specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

The statute relied upon under subsection (b)(3) is I.R.C. §6103 (e)(6) which provides:

> Return information with respect to any taxpayer may be open to inspection by or disclosure to any person authorized by this subsection to inspect any return of such taxpayer, if the Secretary determines that such disclosure would not seriously impair Federal tax administration.

Your clients are the subject of a current criminal investigation. A determination has been made that the disclosure of the documents you requested would seriously impair Federal tax administration.

Furthermore, subsection (b)(7)(A) of the FOIA exempts from disclosure the documents you requested. Subsection (b)(7)(A) provides an exemption from disclosure for:

> investigatory records compiled for law enforcement purposes . . . to the extent that the production of such records would interfere with enforcement proceedings.

As previously stated, your clients are the subject of a current criminal investigation, therefore disclosure of these documents would reveal the direction of the investigation and result in a premature release of the government's case. Hence, disclosure of the documents not enclosed herewith would constitute an interference with enforcement proceedings.

Appendix A

> Under the provisions of the FOIA, you are entitled to judicial review of this decision. You may file a complaint pursuant to 5 U.S.C. §552(a)(4) in the United States District Court in the district in which the complainant resides, or has a principal place of business, or in which the agency records are located, or in the District of Columbia. The documents you requested which are not enclosed are located in the Newark Office.

App. at 80-81 (emphasis supplied). An identical letter was sent with regard to Myron and Heidi Levey. App. at 82-83. Undoubtedly, as Levey contends, the attitude of the Deputy Commissioner is indicative of the institutional posture of I.R.S., as contrasted with the views of an agent, which are irrelevant on this score, *see, e.g., LaSalle,* 437 U.S. at 316 n. 17; *Garden State,* 607 F.2d at 68 n. 10. But these letters[5] prove no more than that there was a criminal investigation as of the time they were both written, June 27, 1979. They do not imply that there was a criminal investigation under way when the summonses were served, August 10, 1978, or when enforcement was sought, December 19, 1978. Moreover, given the organizational structure of I.R.S., civil and criminal investigations are almost always intertwined, as recognized in *LaSalle,* 437 U.S. at 308-11, and in *Garden State,* 607 F.2d at 67. Proof of a criminal investigation does not preclude the existence of a civil investigative purpose for the summons, and it is the presence of the latter which is the critical factor, and which must be negated by the taxpayer.[6]

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5. At oral argument, it was represented that letters such as the one quoted are standard form letters.

6. In light of the text of the Deputy Commissioner's letters it is interesting to note that the District Court for the District of Columbia has recently decided that I.R.C. §6103(e)(6), 26 U.S.C. §6103(e)(6), which provides for disclosure of tax return information if the Treasury Secretary "determines that such disclosure would not seriously impair Federal tax administration," is an independent

Our examination of the sealed transcript has shed some light on the second item of evidence cited by Levey.[7] On a letter to the United States Attorney written by one official in the Newark I.R.S. office appeared a notation in the handwriting of another official: "I would hope that this case will result in prosecution." This is not, as we have indicated, a recommendation to the Justice Department for prosecution. Moreover, we hold that the attitude of such an official is not evidence of I.R.S.' institutional posture. Finally, there is nothing in the record to indicate that there was ever any information funneled to the United States Attorney; so the "conduit" exception of *Garden State* is inapplicable.

Levey's reliance on the third piece of evidence may be disposed of summarily. An unmistakable holding of *Garden State*, 607 F.2d at 66 n.7, which we reiterate today, is that whether or not I.R.S. desires to compromise civil tax liability is irrelevant to the determination of "institutional bad faith."

In sum, while we do not agree with the district court's analysis insofar as it rests upon its belief that *LaSalle* institutional bad faith can never be found, we conclude that the district court did not err in enforcing

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NOTE 6 — *(Continued)*
standard governing disclosure and not merely a statute specifically exempting disclosure under the Freedom of Information Act. Zale Corp. v. IRS, 48 U.S.L.W. 2442 (D.D.C. Dec. 14, 1979). While this ruling enlarges the discretion of the Commissioner to deny disclosure, it of course does not affect our conclusions regarding the evidentiary value of the Deputy Commissioner's letters. What *Zale* does do is to preclude a taxpayer from employing a Freedom of Information Act request to obtain information by an "end run" around the restrictive discovery conditions set forth in *Garden State*, 607 F.2d at 71.

7. Levey's reference to this evidence in his appellate brief was necessarily based on the district court's oral comments at the close of the trial, which comments referred to the *in camera* proceeding.

the summonses, since under *Garden State*, "institutional bad faith" could not be found on this record.[8]

B.

The question whether the Internal Revenue Service may obtain by administrative summons the copies of forms 1099 and 1087 retained by third-party recordkeepers appears to be one of first impression. In *United States v. Powell*, 379 U.S. 48 (1964), the Supreme Court held:

> He [the Commissioner] must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed — in particular, that the "Secretary or his delegate," after investigation, has determined the further examination to be necessary and has notified the taxpayer in writing to that effect.

Id. at 57-58. Levey argues that on a literal reading of *Powell*, I.R.S. has "possession" of the information contained in forms 1099 and 1087, since it has already received copies of the forms. We disagree.

As we understand, forms 1099 and 1087 are required to be prepared by those from whom taxpayers have received nonwage income. *See* note 2 *supra*. Generally, as they reflect interest income paid by a bank to its depositors or account-holders, or investment dividends paid by corporate entities, at the end of each tax year, the source of the payments will prepare a form 1099 in three copies. Copy A is transmitted to one of ten

---

8. *See* PAAC v. Rizzo, 502 F.2d 306, 308 & n.7 (3d Cir. 1974) ("It is proper for an appellate court to affirm a *correct* decision of a lower court even when that decision is based on an inappropriate ground."), *cert. denied*, 419 U.S. 1108 (1975).

Internal Revenue Service Centers, copy B is sent to the recipient of the income, and copy C is retained by the payer. A similar procedure is followed by nominees who distribute income; the form filed by nominees is form 1087. The information recorded on the forms, and the filing of the forms, are designed to aid in tax reporting by the taxpayer and tax verification by the Service. Neither form is filed with the taxpayer's income tax return, although the information shown on the forms is intended to be incorporated in the return.

The Government explained at oral argument before us that forms 1099 and 1087 are used for a limited investigative purpose. Forms filed for a randomly selected group of taxpayers are checked against returns filed by those taxpayers for accuracy. Incredibly, all the forms are stored by the Service without any indexing system or method of retrieval.[9] While the forms at issue may technically be deemed within the physical proprietary control of the Government, it is clear that the "information sought," *Powell*, 379 U.S. at 58, is, as a practical matter, neither accessible to nor available to I.R.S. The clear purpose of *Powell*, as confirmed by the other three showings that must be made by the Government to justify enforcement of a summons (legitimacy of purpose, relevance, compliance with proper procedure), is a desire to prevent abuse of the administrative summons process and harassment of the taxpayer. *Powell* does not address the subject of protection of property rights to pieces of paper. Where resort to an administrative summons is necessary to achieve a lawful goal, *i.e.*, to obtain information not otherwise available, there can be no le-

9. Because of the sheer volume of forms and the fact that some come in on paper rather than on magnetic tape, the costs of retrieval would be prohibitive. For the same reasons, they apparently are discarded after about five years. At oral argument, the Government represented that the forms that are the subjects of the summonses in this case have probably, therefore, been discarded. We do not decide whether this last fact alone would negate "possession."

gitimate charge of "harassment." Thus, *Powell* is no barrier to the enforcement of summonses requiring the production by banks of their copies of forms 1099 and 1087.

This conclusion is supported by other cases that have considered analogous issues. In *United States v. Berkowitz*, 488 F.2d 1235 (3d Cir. 1973), *cert. denied*, 421 U.S. 946 (1975), this court enforced an I.R.S. summons to a tax preparer for the names and addresses of all his customers for 1971. We stated:

> Even if the corporate appellant had indicated its role on every form which it had prepared, from a practical standpoint those returns would not be readily available to the government since there is no method of retrieval for the 1971 documents. To require the Internal Revenue Service to review individually the millions of forms filed in 1971 is so obviously burdensome as to make the procedure prohibitive. Furthermore, the action of the Berk Tax Service in failing to sign the return secured by pretext naturally leads to suspicion that other customers' returns are similarly deficient and would not be identifiable.

488 F.2d at 1236. In *United States v. Theodore*, 479 F.2d 749, 755 (4th Cir. 1973), the Fourth Circuit refused to enforce summonses directed to a tax preparer for the returns of all his clients for 1969, 1970, and 1971 because, *inter alia*, there was no record evidence that I.R.S. could not readily retrieve the information:

> There is nothing in the record to support the conclusion that when IRS knows the name and social security number of a taxpayer, the Service cannot readily obtain his return. The obligation is upon the Commissioner to demonstrate that the material requested is not within his possession or, that *if it is technically within his possession, he has no practical way of obtaining the desired item.*

Id. (emphasis supplied). *Cf. United States v. Schwartz*, 469 F.2d 977, 985 (5th Cir. 1972) (where reference would have to be made to voluminous corporate records to locate information, I.R.S. could not be said to be in possession even though an I.R.S. agent had had access to inspect records).

Thus, *Berkowitz*, *Theodore*, and *Schwartz* support not the taxpayer, but the position taken by the Service, with which we agree. Where the Service requires the production of the name, address, or social security number of a taxpayer and not the particular return, that information must be furnished, and it is no answer to assert, as the taxpayer here has asserted, that the Service "has" this information in its files even though it is incapable of being retrieved. It is but a logical extension, well within the parameters of the rationale of these cases, to hold that this concept similarly applies to the furnishing of retained copies of forms 1099 and 1087. The clear import of these cases is that I.R.S. may obtain such information by summons unless the facts disclose that the summons is not necessary to accomplish I.R.S.' purpose and is therefore being used to harass the taxpayer.

Nor is there any merit to the district court's discourse concerning the relative economic burdens, as between the Service and the banks, of producing the documents. *Powell* sought to prevent harassment, not to shield banks from administrative expenditures. Moreover, and of substantial significance here, no bank in this case ever objected to retrieving the documents which they had retained or to producing them in response to the summonses. Even had there been an "economic objection," I.R.S. stood ready to supply its own personnel to perform the work, at Government cost. As the Government pointed out in its brief:

> In sum, the District Court created an issue which had not been raised by the parties, decided that issue on the basis of its perceptions of the issue rather than evidence, and ignored the holding of this Court in *Berkowitz*, *supra*, in the process.

Government brief at 11 (footnote omitted).

Thus, we hold that the district court, by construing the *Powell* possession requirement in too literal a fashion, and without regard to the purpose intended to be served by this requirement, erred in not ordering enforcement of the retained copies of forms 1099 and 1087.

III.

One matter remains to be clarified. Although neither party has questioned paragraph 7 of the district court's order of April 27, 1979, we cannot ignore the problems that this portion of the order, if allowed to remain in force, may create. The paragraph in question reads:

> . . . Nothing in this Order is intended to bar whatever right any intervenor may have to challenge the use of any information, testimony or document obtained pursuant to this Order, or any information directly or indirectly derived therefrom, in any other case, controversy, action or proceeding of any nature whatever, regardless of the theory on which such bar may be grounded.

App. at 51-52. As we read this portion of the district court's order, it appears to us to be too sweeping. If it purports to leave open the possibility that in a later civil or criminal proceeding between the parties, the evidence obtained through the enforcement of these summonses might again be subject to attack or be suppressed on the ground that the summonses were invalid, it is indeed too broad. We noted in *Garden State:*

> We perceive no reason to treat the question of the validity of I.R.S. summonses any differently in the

> present cases, simply because the summonses in question have not yet been enforced. The only difference lies in the remedy — whether or not to enforce the summons, as opposed to whether or not to reverse a conviction.

607 F.2d at 69 n.11. Since the legal issue of summons validity is the same regardless of the context in which it arises, the judgment here that *these* particular summonses are valid will bind the parties in future litigation, even though the present judgment arises in an enforcement setting. This, in turn, leads to the conclusion that the parties will be collaterally estopped from challenging any fact necessary to our legal conclusion that the summonses are valid. Because collateral estoppel is a legal doctrine for consideration and application in the court in which any *future* proceedings are commenced, the district court here may not limit the collateral effect of its order. While we recognize that we ordinarily do not discuss matters not raised by the parties, here we do so in order to delineate the scope of our judgment and to forestall the possibility of additional and unnecessary proceedings.

IV.

The district court's order of April 27, 1979 will be affirmed except insofar as it exempts from production the retained copies of forms 1099 and 1087, and except insofar as it purports to limit its own effect in any future proceeding. Thus, subject only to these modifications, we will affirm the district court's order granting enforcement in the taxpayer's appeal at No. 79-1708, and we will reverse the district court's order in the Government's appeal at No. 79-1707.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX B

Judgment of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 79-1707 and 79-1708

UNITED STATES OF AMERICA and JOHN R. CASSIE, JR., Special Agent Internal Revenue Service,

Petitioner,

vs.

FIRST NATIONAL STATE BANK OF NEW JERSEY,

Respondent,

PERRY LEVEY, Intervenor,
(D.C. Civil No. 78-3054)

UNITED STATES OF AMERICA and JOHN R. CASSIE, JR., Special Agent, Internal Revenue Service,

Petitioner,

vs.

BERKELEY FEDERAL SAVINGS AND LOAN ASSOCIATION,

Respondent,

PERRY LEVEY, Intervenor,
(D.C. Civil No. 78-3055)

Appendix B

UNITED STATES OF AMERICA and JOHN R. CASSIE, JR., Special Agent, Internal Revenue Service,

Petitioner,

vs.

HUDSON SAVINGS BANK,

Respondent,

PERRY LEVEY, Intervenor,
(D.C. Civil No. 79-0282)

UNITED STATES OF AMERICA and JOHN R. CASSIE, JR., Special Agent, Internal Revenue Service,

Petitioner,

vs.

LIVINGSTON NATIONAL BANK,

Respondent,

PERRY LEVEY, Intervenor,
(D.C. Civil No. 79-0283)

UNITED STATES OF AMERICA and JOHN R. CASSIE, Petitioners in D.C. Civil No. 78-3054,

Appellants, No. 79-1707,

PERRY LEVEY, Intervenor in D.C. Civil No. 78-3054, and MYRON LEVEY,

Appellants, No. 79-1708.

Appendix B

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Present: GIBBONS, ROSENN and GARTH, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on January 9, 1980.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court filed April 27, 1979, be, and the same is hereby affirmed with respect to the taxpayer's appeal at No. 79-1708 and reversed with respect to the Government's appeal at No. 79-1707 all in accordance with the opinion of this Court.

ATTEST:

THOMAS F. QUINN
Clerk

February 13, 1980

Certified as a true copy and issued in lieu of a formal mandate as to No. 79-1708 on March 6, 1980.

Test:

THOMAS F. QUINN
Clerk, United States Court of Appeals
for the Third Circuit

APPENDIX C

Opinion and Order of the United States District Court for the District of New Jersey

UNITED STATES OF AMERICA and JOHN R. CASSIE, JR.,

Plaintiffs,

v.

FIRST NATIONAL STATE BANK OF NEW JERSEY,

Defendant,

v.

P. L. (taxpayer), Intervenor.

Civ. No. 78-3054.

United States District Court,
D. New Jersey.

April 17, 1979.

Memorandum Order April 26, 1979.

Petitions were filed for enforcement of IRS summonses issued to a number of third-party recordkeepers in connection with investigation of specified taxpayer. The District Court, Biunno, J., held that enforcement of summonses would be ordered, except for retained copies of Form 1099.

Order accordingly.

Appendix C

Robert J. Del Tufo, U. S. Atty., by Eric L. Chase, Asst. U. S. Atty., Newark, N. J., for plaintiffs.

Herbert L. Zuckerman and Lawrence S. Horn, Newark, N. J., for intervenor.

No appearance for defendant.

OPINION

BRUNNO, District Judge.

The combination of *U. S.* v. *LaSalle National Bank,* 437 U.S. 298, 92 S.Ct. 2357, 57 L.Ed2d 221 (1978), the amendments made by the Tax Reform Act of 1976 to 26 U.S.C. § 7609, and the "Right to Financial Privacy Act of 1978", Pub.L. 95-630, § 1100, *et seq.,* effective March 19, 1979, among other factors, has generated extremely complex judicial problems in considering and deciding a large number of IRS summons enforcement cases which, before these new factors arose, were quite few or rare, and involved little time or effort.

LaSalle is important because it is the newest ruling by the Supreme Court in a line of cases marked particularly by *Reisman* v. *Caplan,* 375 U.S. 440, 84 S.Ct. 508, 11 L.Ed. 2d 459 (1964); *U. S.* v. *Powell,* 379 U.S. 48, 85 S.Ct. 248, 13 L.Ed.2d 112 (1964) and *Donaldson* v. *U. S.,* 400 U.S. 517, 91 S.Ct. 534, 27 L.Ed.2d 580 (1971).

In this Circuit, other pertinent decisions in the line or essentially parallel to it include *In re Grand Jury Proceedings* (Schofield), 486 F.2d 85 (CA-3, 1973), *U. S.* v. *McCarthy,* 514 F.2d 368 (CA-3, 1975), *U. S.* v. *Genser,* 582 F.2d 292 (CA-3, 1978), and after remand, 595 F.2d 146 (CA-3, 1979), (Nos. 76-2623/4, decided March 9, 1979).

Appendix C

Other pertinent decisions in various courts of other circuits include *Trapp* v. *Baptist,* (D-Ala., 1978) (CCH U.S. Tax Cases, 3/14/79, ¶ 9241); *U. S.* v. *Del Sandro,* 465 F. Supp. 1009 (D-Pa., 1979); *U. S.* v. *Bank of Monte Vista,* 451 F.Supp. 945 (D-Colo., 1978); *U. S.* v. *Shivlock,* 459 F. Supp. 1383 (D-Colo., 1978); *U. S.* v. *Chemical Bank,* 593 F.2d 451 (CA-2, 1979).

The facts briefly are that a series of IRS summonses were issued to a number of third-party record keepers in connection with an investigation of a specified taxpayer. As provided by the 1976 Act, notice of the summonses was given to the taxpayer who, as allowed by the Act, wrote the record keepers to instruct them not to comply, a step which serves as an automatic stay without formal steps either before IRS or a court.

Thereafter, the United States and the special agent of IRS who had issued the summonses filed a series of "petitions" for enforcement, under 26 U.S.C. § 7604, one petition for each summons. With each one an order to show cause was submitted, which was issued with a return date. Taxpayer appeared and intervened in all the cases.

By stipulations of record at the hearing, it was established that there had not at that point been any referral by IRS to the Attorney General, the event chosen by the *LaSalle* court as the line of demarcation at which the intertwined civil and criminal aspects of an IRS investigation diverge.[1] It was also established that, on the strength of comments made by this court in *U. S.* v. *Garden State Nat'l Bank,* 465 F.Supp. 437 (D.N.J., 1979),

[1] Strictly speaking the aspects do not diverge at this point. At least so far as 26 U.S.C. Section 7122(a) is concerned, both aspects are transferred from Treasury to Justice.

Taxpayer (through a representative) asked IRS to meet and confer in an effort to negotiate a compromise of the civil aspects; no request was made to negotiate and compromise criminal aspects as well, see 26 U.S.C. § 7122(a). IRS declined to meet, because its investigation was not complete.

At this posture, the court continued the hearing to a new date by order conditioning the requested enforcement order on a good faith participation by IRS in negotiations aimed at arriving at a compromise. Claiming that the court lacked authority to specify that condition, IRS declined to comply. In so doing, it doubtless preserved the issue while discarding an opportunity to secure all the information it seeks via good faith negotiations which would in no way have restricted it in considering whether or not to refer the matter to the Attorney-General for criminal prosecution.

So much of the court's effort having proven unproductive, the court then undertook an inspection in camera of the IRS intraoffice memos, with the participation of the Assistant U.S. Attorney and the Special Agent to explain the various documents. A sealed transcript was prepared.

From the record, it appeared that the delay from when summonses were first issued to the time when the summons enforcement proceedings were filed was obviously attributable to uncertainties about the effect of the *LaSalle* decision, which came down about the time the first requests for enforcement were made. Draft boilerplate letters, evidently prepared locally and sent to IRS counsel for signature to authorize enforcement proceedings, did not mention *LaSalle* in the first group. The second group of drafts did.

All the drafts make reference to the requirement, in *Powell* and *McCarthy,* for a showing that IRS did not already have what it sought. In this group of cases, all of the third-party recordkeepers were of a kind which were required to file Form 1099 (information return) with IRS, and send a copy to the taxpayer. The in camera hearing established that for all third-party recordkeepers, IRS already had the Form 1099 information. For that reason, the court ruled that the enforcement order was not to reach retained copies of Form 1099.

The reasons for this limitation are obvious. As is well and widely known, IRS simply receives the millions of Form 1099 filed with it and stores them. It has established no arrangement or system to match the filed Forms 1099 with the corresponding tax returns. Without disclosing details mentioned in the sealed record, it appears that some Form 1099 information is picked up and checked against taxpayer returns, and if the item is not reported on the schedules, an investigation may ensue.

When Form 1099 information is at hand, IRS knows the name of the taxpayer, the amount of the interest or dividend reported, and the name of the payor. Given this information, IRS is entitled to issue summons to the payor, a third-party record-keeper, for its own books and records in respect to taxpayer, without having any need for the retained copy of Form 1099.

Like any other information report, a Form 1099 may contain one or more errors. The test in determining a taxpayer's liability is not what the Form 1099 shows, but what the payor's records show, particularly entries of accrued interest, or cancelled checks for interest or divi-

dends. These are primary records. The Form 1099 is not. Since IRS already knows what the Form 1099 information is, investigation and verification are not advanced by inspection of the payor's retained copy, but will be by inspection of primary records, which may or may not be the same as the Form 1099 information.

Conceivably, IRS may want the payor's retained copy as proof that the taxpayer received his copy, a factor which could go to the issue of knowing failure to report the item. If so, the basis is irrational since tangible evidence of the retained copy is not proof that taxpayer received it. No bank or dividend-paying corporation of any size is likely to be able to produce any witness able to testify that taxpayer X's Form 1099 was mailed to him. The most that can be expected is that some witness will be able to testify about the business system used to prepare these forms and to mail them out, and no more. No such witness could be expected to testify that X's form was mailed to him. As with any large mailing X's form may have wound up in Y's envelope. Thus, the only evidence of any value would be evidence of the system, a subject that can be inquired into outside of 26 U.S.C. § 7609 since it does not involve the production of records duces tecum. And, since IRS possesses the Form 1099, and could only have it if it was sent to it by the payor, it already has all the proof it needs on that score.

[1] The fact that IRS possesses Form 1099 information, either on paper forms or on magnetic tape, is enough to preclude summons enforcement to the payor for retained copies. If IRS has not arranged to look up the filed information it has, no doubt because of cost considerations, it can hardly put that burden on payors. To do so would impose on payors the very burden of cost and

expense avoided by IRS in failing to provide itself with means for access to its own records. The cost of arranging all Forms 1099 alphabetically by taxpayer name, or numerically by ID Number, is just as great for all payors as it would be for IRS.[2] If IRS is free to store Forms 1099 in warehouses without means of access, there is no reason why a payor cannot do the same, and when served with an IRS summons merely say: "We have all our retained copies of Form 1099 but they are merely stored, any which way, and we can't locate any particular one without going through all of them".

To suggest that the payors must make an outlay to organize all their retained copies for easy location and retrieval, when only a small number will ever be called for, would impose on them the kind of expense to perform a governmental function that would make Vivian Kellems chortle, "I told you so,". For those who do not recall her, see *Kellems* v. *U. S.*, 97 F.Supp. 681 (D—Conn., 1951) and *Kellems* v. *California C. I. O. C.*, 68 F.Supp. 277 (D—Cal., 1946). See, also, *Neal* v. *U. S.*, 402 F.Supp. 678 (D—N.J., 1975).

The decision in *U. S.* v. *Theodore*, 479 F.2d 749 (CA—4, 1973) relied on by the United States is not to the contrary. In that case, the summons was directed to a tax preparer, himself the target of an investigation as the result of field tests indicating that returns were not properly prepared. The summons was for retained copies of all returns prepared for the years 1969-1971. Necessarily, IRS had the original returns if they were filed at all, and

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[2] This cost, as well as the cost of retrieval, is in addition to the cost of creating the information returns in the first place and the cost of mailing.

the summons was resisted on that ground. IRS replied that there was no way to locate those returns made out by the prepared without examining all filed returns to find out who prepared them. Despite this argument, the District Court enforcement order was reversed as too broad and too vague, and enforcement was limited to providing a list of the names, social security numbers and addresses of taxpayers for whom returns had been prepared. With such a list, rather than the retained copies, it was indicated that IRS could locate and examine its own filed returns.

[2] Rather than support the United States, the rationale of that ruling supports the objection. If any general principle is to be inferred from the ruling, it is that IRS may not use the court's process to place on another a burden it can, or should be able to, carry itself. See, also, *U. S.* v. *Bank of Monte Vista,* 451 F.Supp. 945 (D—Colo., 1978), memorandum opinion by Chief Judge Winner.

[3] On the issue of enforcement of the summonses as such, the court has concluded after extensive deliberation that the record before it leaves it no choice but to order enforcement, except for the retained copies of Form 1099.

This conclusion stems from what the court regards as the law binding on it, so far as laid down by the Supreme Court and the Court of Appeals. Were it not for this, the court's inclination would have been to allow discovery so that taxpayer could have an opportunity to meet the very heavy burden of showing "institutional bad faith" under *LaSalle.* However, the court considers that this burden could not be met on the record and theories involved in this case under existing decisions.

Institutional bad faith is an undefined term. In this case it had seemed that a partial definition might have been developed on the theory that IRS refusal to negotiate, looking to a possible compromise if one can be reached, despite taxpayer's request, might reflect a de facto position, institutionally taken, in conflict with what the statutes and regulations say.

It is true that the *LaSalle* court, in selecting the event of referral as the point beyond which an IRS summons may not issue, relied heavily on the complete division of compromise authority specified by 26 U.S.C. § 7122. It is also true that that ruling assumed the existence of interagency cooperation, both before and after referral, so that the Congressional purpose to have compromises of both the civil and criminal aspects of a tax case could be achieved. That assumed cooperation, it said, is "to be expected and probably encourages efficient settlement of the dispute." See 98 S.Ct. at 2365, column 2.

The record here shows clearly that in fact and practice there is no cooperation of the kind probably understood by the *LaSalle* court. Evidently, before referral, there is no participation by the U.S. Attorney's office except for the limited purpose of carrying out a referral to file complaint for an enforcement order (since IRS and its staff counsel cannot appear in court except through the U.S. Attorney). On those limited referrals, the assistant given the matter is one from the civil division who is not trained or equipped to handle the criminal aspect if there be one. The "case" itself, of course, still remains with IRS for all purposes except the securing of an enforcement order. Thus, there is no means for "interagency cooperation" at that point, in the sense that IRS can negotiate a settlement of both civil and criminal aspects, with informal

participation by the U.S. Attorney to assist in the negotiation of an agreement under Rule 11, F.R.Crim.P., which IRS by itself is probably unequipped to handle.

The court also takes judicial notice, from frequent observation of such cases over the years, that even after referral for criminal charges, and even when the criminal charges are resolved through a Rule 11 agreement, there is no interagency cooperation at all except for the criminal aspects, and never for the purpose of achieving "efficient settlement of the dispute" by compromise of both civil and criminal aspects.[3]

After referral, to the extent that the U.S. Attorney needs technical aid and support to analyze material obtained by the Grand Jury, the court is traditionally presented with an order to allow IRS personnel to have access so that they may aid the U.S. Attorney in performing his function, even though IRS "completed" its investigation for both civil and criminal purposes before referral. That, of course, was the required practice in this Circuit before the 1977 amendment to Rule 6(e), F.R. Crim.P., as exemplied by *In re Grand Jury Proceedings,* 309 F.2d 440 (CA-3, 1963), and *Robert Hawthorne* v. *Director, etc.,* 406 F.Supp. 1098 (D-Pa., 1976) (including the reference to *Shamy* v. *Goldstein,* at pp. 1122-1123); *In re Grand Jury Proceedings (Pflaumer),* 53 F.R.D. 464 (D-Pa., 1971). And see also, Note of Advisory Committee on Rules, 1977 Amendment, and Notes of Committee on the Judiciary, Senate Report No. 95-354, as published in the 1979 West Pocket Part for Title 18 U.S.C.A., Rule 6, at

[3] In a criminal tax case, the assistant is one from the Criminal Division and is untrained in the civil aspects of tax law. These are handled from Washington.

pp. 26-27. Under the 1977 Amendment to Rule 6(e) disclosure of Grand Jury materials may be made without court order to government personnel (such as from IRS) as are needed to assist the U.S. Attorney; and disclosures thereof are made to the court under Rule 6(e)(2)(B).

By that last provision, the government personnel (e. g., IRS) may not use the Grand Jury material for any purpose other than to help the U.S. Attorney in performing his duty to enforce Federal *criminal* law. Thus, in a referred tax case, the rule seems on its face to bar IRS from providing the kind of interagency cooperation needed for the U.S. Attorney to negotiate and compromise not only a Rule 11 agreement for the criminal charge but also a disposition of the *civil* aspect, by compromise, as contemplated by 26 U.S.C. § 7122(a) and the *LaSalle* court.

Not only that, but the absence of IRS cooperation on a referred case disposed of by plea under a Rule 11 agreement shackles the court at sentence time because the door to resolve the civil tax liability along with the plea, or after plea and before sentence, is shut tight. Unlike other criminal cases with civil aspects, such as embezzlement, bank misapplication, mail or wire fraud, false statements on F.H.A. applications, interstate theft, and countless others, the defendant in a tax case is precluded from resolving the civil claim so that it may be taken into account at sentence, where it can be an important consideration.

Also, the court knows that after the criminal tax case is closed, the case is re-referred back to IRS to take up the civil tax liability (which can include a fraud penalty). This is evident from the flow of *ex parte* orders

to allow the U.S. Attorney to turn over the Grand Jury material to IRS so tha ti tmay take up the civil aspects.[4]

It has also been stated on the record in this and other cases that while the Secretary of the Treasury has entered delegation orders for compromises down to the District Director level, see Standard Federal Tax Reporter (CCH, 1979), at ¶ 5967.0257, *et seq.*, the Attorney General evidently has not, even after a referral under 26 U.S.C. § 7122(a). Thus, on a referred case, the U.S. Attorney may act only in respect to the criminal side of the tax case, including the negotiation of Rule 11 agreements, but claims to have no authority to negotiate and compromise the civil aspects of the same case. Evidently, IRS must consider itself without authority to provide the interagency cooperation envisioned by the *LaSalle* court in order to achieve efficient settlement of the dispute, probably on the theory that the event of referral transfers exclusive authority to the Attorney General.

In tax fraud cases, which are the kind the *LaSalle* court viewed as the ones where the element of fraud carried civil penalties as well as the risk of criminal prosecution, the regulations to implement § 7122 expressly bar compromise of criminal liability. See Reg. § 301.7122-1(b), second sentence, in Standard Federal Tax Reporter (CCH, 1979), at ¶ 5695.

Hence, while there is no doubt that taxpayer here has all access to negotiations blocked institutionally, the court is by no means confident that the blocking, even though it obviously frustrates Congressional purpose and the understanding of the *LaSalle* court, constitutes "institutional bad faith".

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[4] Under Rule 6(e), F.R.Crim.P. as amended in 1977, it may be that there is no authority for these orders allowing Grand Jury material to go to IRS after re-referral.

Conference practice is spelled out generally in the regulations, 26 C.F.R. § 601.501, and in the case of matters in the Intelligence Division, by 26 C.F.R. § 601.107, the latter of which appears to apply here. While paragraph (b)(2) says that a taxpayer "who may be the subject of a criminal investigation will be afforded a district intelligence conference when he requests one", the scope of the conference as there detailed is limited and does not by its terms extend to negotiations looking to a possible compromise of civil tax liabilities. Presumably this is because the personnel of the division, unlike the revenue agents of the audit division, are not equipped (and perhaps not authorized) to deal with civil tax aspects except for items like the 50% ad valorem tax under 26 U.S.C. § 6653(h) and § 6659(a), as noted by the *LaSalle* court.

In practice, as the court understands it from the record here, once a tax case is assigned to the Intelligence Division, that agent is in charge of the matter, and although a revenue agent is assigned to work with him he is subordinate. If audit aspects are pending, they are asked to be suspended entirely while the Intelligence investigation goes on. The effect is that the civil aspects are not "abandoned", in the sense that the administrative summons can be said to be intended for an "investigation [which] has solely criminal purposes", 98 S.Ct. at 2367.

Taxpayers' frustration, and the frustration of the Congressional purpose, then, seems to be the result of institutional *structure* within and between IRS and the Department of Justice, brought about by the interplay between statutes, regulations, delegation orders or their absence, rather than of institutional *bad faith.*

No doubt this institutional structure, by closing all avenues to any kind of negotiation during the time that the civil tax aspects are "on the shelf" but not "abandoned" is a hindrance not only to interagency cooperation but to intraagency cooperation as well, and prevents any achievement of efficient settlement of the dispute by any means once the Intelligence Division is in the picture until (a) there is a decision not to refer for prosecution or (b) there is a re-referral to IRS after referred cases are closed by judgment of dismissal, acquittal or sentence. Until then, the case is in limbo, "on the shelf", in a state of suspended animation.

Whether this is what the upper courts mean when they speak of an "abandonment" of civil aspects is far from clear, especially when all indications are that IRS does not ever "abandon" civil aspects if anything in the case is active. Even if a taxpayer dies, thus precluding criminal prosecution, civil aspects can continue to be pursued against his estate. Absent clearer guidance, this court does not feel authorized to regard the suspension of the civil aspect as amounting to even a temporary "abandonment" (an inherent contradiction in terms). It is only if upper courts conclude that during the time the civil aspects are shelved the investigation has solely criminal purposes can enforcement be denied on that theory at the trial level. Absent such an articulation, it is doubted that any taxpayer will ever be able to show institutional bad faith, much less carry his very heavy burden.

The net practical effect may be that the forecast of the minority in *LaSalle* (which would not have allowed any inquiry so long as the summons is issued before referral) will become reality, and the Congressional pur-

poses of requiring notice, authorizing automatic stay and mandating intervention, 26 U.S.C. § 7609, may be rendered "unworkable".

Certainly, it puts in doubt the perceptive analysis of Judge Gibbons in *In re Grand Jury Proceedings (Schofield)*, 486 F.2d 85, at 89-92 (CA-3, 1973). That ruling equated the administrative summons or subpoena with the Grand Jury subpoena in enforcement cases and comprehensively, if not definitively, reviewed the many constitutional areas open to exploration and determination before a court will be satisfied that its process will not be abused or misused by entry of the order.

Nor does the court consider that it has authority, in view of the closed doors of the institutional structures of IRS and Department of Justice, to condition the grant of a compliance order on good faith negotiations by taxpayer and IRS for a reasonable period, to explore the likelihood of arriving at a compromise of the civil and criminal aspects. Such a condition, were it authorized, would go far toward achieving efficient administration of the tax laws first because it would encourage negotiations evidently not conducted at all now, and because taxpayer's good faith might depend on his willingness to withdraw his objections to the summons. Full disclosure would clearly be essential to a valid compromise.

[4] Finally, a word must be said in respect to procedure. This District has not adopted a local rule adopting procedures like those suggested in *U. S.* v. *McCarthy*, 514 F.2d 368 (CA-3, 1975). This being so, the procedure using a petition and order to show cause to the witness (bank or corporation, etc.) is not proper. Enforcement suits, absent a local rule, should follow the usual practice of a

Appendix C

summons and complaint, followed by answer, application and order for intervention, and so on. In this class of cases, the summoned witness is in fact a stakeholder with no interest. It is not the real party in interest; the taxpayer is. Hence, the summoned witness preferably should file answer with a counterclaim for interpleader, or in the nature of interpleader, so that it can be allowed its costs and expenses of compliance and step out of the case, leaving the United States and the taxpayer to litigate the only real dispute there is.[5]

Since that procedure was not followed here, all of the summoned witnesses will be regarded as having filed such pleadings, and to be entitled to their costs and expenses of compliance, and the order to be submitted should so provide.

[5] This ruling will be applicable to the companion case, Civ. 78-3056 (Consolidated) and a like order is to be submitted for it.[6]

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[5] Another procedure was discussed at the hearing of April 19, 1979. This would use a motion and an order granting leave to proceed in a summary manner, with procedures modelled on the highly successful experience with N.J. Court Rule. R.4:67.

[6] The decision and the enforcement order are not intended to affect whatever right taxpayer may have to challenge the use, in another case, controversy, action or proceeding of any kind, of any of the documents, testimony or information (or any information directly or indirectly derived therefrom) obtained through the enforcement order. One example is a motion to suppress such use at trial on a later criminal charge if there be one. See *U. S.* v. *Genser, supra.*

(Footnote continued on following page)

Appendix C

MEMORANDUM ORDER

At the hearing of April 19, 1979 presentation was made on a number of items for settlement of the form of Order to be entered to effectuate the Opinion dated April 17, 1979. These are decided here.

1. *Access to sealed transcript and documents.*

The United States submitted a group of internal memos of IRS, which were examined in camera. A conference was held to obtain explanations, and the transcript was sealed. Taxpayers ask access to both, for the purposes of appeal. The United States objects.

The documents (and the transcript) come within the class of "official information," privileged under Proposed Fed Ev. Rule 509(a)(2). That Rule was not adpoted, but insofar as it reflects the principles of the common law, as interpreted by the Federal Courts in the light of reason and experience, it is embodied in Fed. Ev. Rule 501.

This case does not involve military secrets such that the claim of privilege must be decided without requiring

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(Footnote continued from preceding page)

It is also observed that, should there be a judgment of conviction in a criminal tax case, such a judgment may not be any evidence of the amount of tax in a later civil suit, even though the indictment recites a specific amount and there be a verdict of guilty or a guilty plea. This is because, even on a charge of willfully and knowingly filing a false tax return, the specific amount charged in the indictment probably is not a "fact essential to the judgment." See Fed. Ev. Rule 803(22). There may be a number of items making up the specific amount, and a general verdict or plea of guilty will be valid if any one be false.

disclosure, even in camera, *U. S.* v. *Reynolds,* 345 U.S. 1, 73 S.Ct. 528, 97 L.Ed. 727 (1953). Rather, it is a case in which the Government's claim of need for secrecy is to be balanced with the party's need for disclosure, albeit under a protective order. See, for example, *Boeing, etc.* v. *Coggeshall,* 108 U.S.App.D.C. 106, 280, F.2d 654 (1960); *Ackerly* v. *Ley,* 137 U.S.App.D.C. 133, 420 F.2d 1336 (1969); *Davis* v. *Braswell,* 363 F.2d 600 (CA—5, 1966); *Kaiser, etc.* v. *U. S.* 157 F.Supp. 939, 141 Ct.Cl. 38 (1958). The indications are that the test is whether disclosure in the action would be harmful to the interests of the public. Compare N.J. Ev. Rule 34, N.J.S.A. 2A: 84A-27. See, also, *In re John S. Irving,* 600 F.2d 1027 (CA—2, 1979).

On balance, while the Court has already ruled that taxpayers' effort to show institutional bad faith through these sealed materials would be fruitless, they are entitled to try to persuade the Court of Appeals to rule otherwise. They cannot make the argument in any effective way without access to the materials. Disclosure to taxpayers' attorneys only, with a protective provision limiting use of the materials to the purposes of the appeal, requiring any papers on the point to be submitted to that Court under seal, and forbidding disclosure to any other person (including taxpayers) will not be harmful to the interests of the public.

The Order should contain a provision to this end, and also providing that the release under protection be stayed until an Order of a panel of the Court of Appeals be entered to adopt a like protective and sealing Order to govern the proceedings there, or modifying or vacating the provision or the stay or both.

2. *Reconsideration of the denial of a stay pending appeal.*

At its ruling from the bench, the Court denied a stay of the enforcement Order pending appeal. There were several reasons. One was that in the event the enforcement Order be reversed, taxpayers' interests would be adequately protected by a provision requiring IRS to make a detailed, itemized list, and to mark, all documents produced in response to the subpoena to each witness, and a transcript of any evidence adduced other than the exhibits. This was discussed in more detail at the hearing of April 19, 1979. Second, since the time needed for an appeal to be decided is unpredictable, especially in view of the exceptionally heavy workload of the Court of Appeals, the IRS investigation would be unduly hampered in the event of affirmance. The documents sought on the present subpoenas may well be only a first level of the investigation. The information obtained may call for more subpoenas to other witnesses before the investigation is completed.

It is true that *In re Turner,* 309 F.2d 69 (CA—2, 1969) mentions the running of the Statute of Limitations as a factor militating against a stay. It is also true that, as amended in 1976, 26 U.S.C. § 7609(e) suspends the Statute of Limitations as to a taxpayer/intervenor for the time consumed by the enforcement proceeding and appeals therefrom. But the suspension of the Statute of Limitations does not protect against the loss of records of the dimming of memories. Nor does it protect against the running of the Statute of Limitations in respect to persons other than the intervenor, about whose tax liability questions may arise as the result of information gathered.

Appendix C

There may be cases where the issues raised by the answer, or by a counterclaim, in the enforcement action extend beyond the narrow scope of an enforcement suit, in which a stay might well be proper. In this case, no questions are seen beyond the issue of propriety of enforcement according to the standards of *LaSalle.*

Having reconsidered, the Court adheres to its initial ruling that a stay pending appeal be denied. This is without prejudice to taxpayers' right to seek a stay from the Court of Appeals. The date for production of the documents can be set for one some weeks after entry of the Order so that the application can be made meanwhile.

3. *Further consolidation.*

Both sides agree that Civ. 78-3056, involving other taxpayers, should be consolidated with Civ. 78-3054, for all purposes. The issues and record are identical except for the taxpayers and the witnesses. The consolidation will provide means for taking a single appeal on all the questions involved. A separate Order to that end will be entered.

4. *Exhibits.*

There are two folders of IRS memoranda that the Court examined in camera. These will be marked Exhibits C-1 and C-2 under seal.

There is a letter of March 13, 1979 from taxpayers' attorney to the Court in chambers, supplying copies of the Reopening Letters issued to taxpayer. This set will be marked Exhibit C-3.

Appendix C

There is a letter of March 20, 1979 from taxpayers' attorney to the Court in chambers along with papers involving their FOIA request in connection with this matter. This set will be marked Exhibit C-4.

There is a letter of March 29, 1979 from the AUSA dealing with procedures. This letter and attachment will be marked Exhibit C-5.

5. *Other.*

The ruling granting the enforcement Order is not intended to affect adversely taxpayers' rights in other contexts to challenge the right of the United States to make one or another use of the information so obtained. One example, is a motion to suppress evidence at trial of a criminal charge if one be brought, *U. S.* v. *Genser,* 582 F.2d 292 (CA-3, 1978), and after remand, 595 F.2d 146 (CA-3, 1979) (Nos. 76-2623/4, decided March 9, 1979). This is so without regard to whether the theory res judicata, collateral estoppel or any other. The order should contain a provision expressing this point.

So Ordered.

APPENDIX D

Pertinent Provisions of Sections 7602, 7604 and 7609 of the Internal Revenue Code of 1954 (26 U.S.C.)

Title 26, United States Code

§ 7602. Examination of books and witnesses

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned under oath, as may be relevant or material to such inquiry.

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§ 7604. Enforcement of summons

(a) Jurisdiction of district court.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) Enforcement.—Whenever any person summoned under section 6420(e)(2), 6421(f)(2), 6424(d)(2), 6427(f)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

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§ 7609. *Special procedures for third-party summonses*

(a) *Notice.—*

(1) *In general.—If—*

(A) any sunmmons described in subsection (c) is served on any person who is a third-party recordkeeper, and

(B) the summons requires the production of any portion of records made or kept of the business transactions or affairs of any person (other than the person summoned) who is identified in the descrption of the records contained in the summons,

then notice of the summons shall be given to any person so identified within 3 days of the day on which such service is made, but no later than the 14th day before the day fixed in the summons as the day upon which such records are to be examined. Such notice shall be accompanied by a copy of the summons which has been served and shall contain directions for staying compliance with the summons under subsection (b) (2).

(2) *Sufficiency of notice.*—Such notice shall be sufficient if, on or before such third day, such notice is served in the manner provided in section 7603 (relating to service of summons) upon the person entitled to notice, or is mailed by certified or registered mail to the last known address of such person, or, in the absence of a last known address, is left with the person summoned. If such notice is mailed, it shall be sufficient if

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mailed to the last known address of the person entitled to notice or, in the case of notice to the Secretary under section 6903 of the existence of a fiduciary relationship, to the last known address of the fiduciary of such person, even if such person or fiduciary is then deceased, under a legal disability, or no longer in existence.

(3) *Third-party recordkeeper defined.*—For purposes of this subsection the term "third-party recordkeeper" means—

(A) any mutual savings bank, cooperative bank, domestic building and loan association, or other savings institution chartered and supervised as a savings and loan or similiar association under Federal or State law, any bank (as defined in section 581), or any credit union (within the meaning of section 501(c)(14(A));

(B) any consumer reporting agency (as defined under section 603(d) of the Fair Credit Reporting Act (15 U.S.C. 1681a(f)));

(C) any person extending credit through the use of credit cards or similar devices;

(D) any broker (as defined in section 3(a)(4) of the Securities Exchange Act of 1934 (15 U.S.C. 78(a)(4)));

(E) any attorney; and

(F) any accountant.

(4) *Exceptions.*—Paragraph (1) shall not apply to any summons—

(A) served on the person with respect to whose liability the summons is issued, or any officer or employee of such person,

(B) to determine whether or not records of the business transactions or affairs of an identified person have been made or kept, or

(C) described in subsection (f).

(5) *Nature of summons.*—Any summons to which this subsection applies (and any summons in aid of collection described in subsection (c)(2)(B)) shall identify the taxpayer to whom the summons relates or the other person to whom the records pertain and shall provide such other information as will enable the person summoned to locate the records required under the summons.

(b) *Right to intervene; right to stay compliance.*—

(1) *Intervention.*—Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to intervene in any proceeding with respect to the enforcement of such summons under section 7604.

(2) *Right to stay compliance.*—Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to stay compliance with the summons if not later than the 14th day after the day such notice is given in the manner provided in subsection (a)(2)—

(A) notice in writing is given to the person summoned not to comply with the summons, and

(B) a copy of such notice not to comply with the summons is mailed by registered or certified mail to such person and to such office as the Secretary may direct in the notice referred to in subsection (a)(1).

Supreme Court, U. S.
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No. 79-1519

In the Supreme Court of the United States

OCTOBER TERM, 1979

PERRY LEVEY AND MYRON LEVEY, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners seek review of the portion of the decision of the court of appeals enforcing several Internal Revenue summonses directing certain financial institutions to produce retained copies of Forms 1087 and 1099.[1]

The pertinent facts are undisputed and may be summarized as follows: As part of his investigation of petitioners' income tax liabilities, Special Agent John R. Cassie, Jr., of the Criminal Investigation Division, Internal Revenue Service, issued the summonses here in

[1]These forms are used to report to the Internal Revenue Service interest and dividend payments. The payor which prepares each form files one copy with the Internal Revenue Service, provides one copy to the recipient for use in preparing his tax return, and retains one copy in its files. Form 1099 is used by the original payor and Form 1087 is filed by a record recipient of the payment showing the distributions to the actual recipient of the funds (Pet. App. A 5a, n.2).

question directing various financial institutions to produce their records of all of petitioners' accounts and financial transactions including all retained copies of Forms 1087 and 1099. The district court ordered the summonses enforced for all other items but denied enforcement as to the retained copies of Forms 1087 and 1099. The district court reasoned that since copies of each form had been filed with the Internal Revenue Service, the Service had the information contained in those forms in its possession, despite the fact that the Service's retrieval of specific forms from its files is impossible (Pet. App. C 25a-27a).

The court of appeals held the summons fully enforceable. It therefore reversed the portion of the district court's order denying enforcement as to the Forms 1087 and 1099 (Pet. App. A 11a-15a). In so holding, it followed its own precedent and that of the other courts of appeals that the Internal Revenue Service may obtain information by summons even though the documents containing the information sought are already in the Service's physical possession but there is no practical method of retrieving those documents from its files. See *United States* v. *Berkowitz*, 488 F. 2d 1235, 1236 (3d Cir. 1973), cert. denied, 421 U.S. 946 (1975); *United States* v. *Theodore*, 479 F. 2d 749, 755 (4th Cir. 1973); *United States* v. *Turner*, 480 F. 2d 272, 274-275 (7th Cir. 1973); *United States* v. *Schwartz*, 469 F. 2d 977, 985 (5th Cir. 1972).

Petitioners contend (Pet. 4-5) that a summons may not be enforced if the information sought by the summons is contained in a document which is already in the possession of the Internal Revenue Service, even if the document itself may be irretrievable or may have been

destroyed. But the courts of appeals have uniformly rejected such an argument. If a document, although physically in the possession of the Internal Revenue Service, is inaccessible or incapable of being retrieved, then the information contained in that form or document is not "already within the Commissioner's possession" for purposes of the investigation at issue. See *United States* v. *Powell*, 379 U.S. 48, 58 (1964). See also *United States* v. *Berkowitz*, *supra*; *United States* v. *Theodore*, *supra*, 479 F. 2d at 755; *United States* v. *Turner*, *supra*.

Contrary to petitioner's contention (Pet. 6), the decision below does not conflict with *United States* v. *Theodore*, *supra*. There, the court held (479 F. 2d at 755) that under *Powell*, "[t]he obligation is upon the Commissioner to demonstrate that the material requested is not within his possession or, if it is technically within his possession, he has no practical way of obtaining the desired item." The Commissioner has met that test in the instant case. As the court of appeals observed (Pet. App. A 12a), the Forms 1087 and 1099 are stored without any indexing system and, due to the sheer volume of forms, are irretrievable as a practical matter. Furthermore, they are usually discarded after about five years because of the substantial number of such documents. The decision below therefore correctly enforced the summons requesting production of petitioners' non-wage income from their financial institutions.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

MAY 1980

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